

**OPINION
51-185**

March 30, 1951 (OPINION)

TAXATION

RE: Reporting Joint Tenant Income

Advice is requested with respect to the manner in which income from property owned by husband and wife as joint tenants or as tenants in common must be reported under the North Dakota income tax law.

The general rules relating to joint tenants and tenants in common are applicable to husband and wife when they are deemed to hold as joint tenants and tenants in common, provided the common law disabilities of the wife have been removed by statute so that the rules apply." 41 C.J.S. 454, Section 33. That such common law disabilities of the wife have been removed in North Dakota is evident from our Married Woman's Acts, specifically, Sections 14-0704 through 14-0708, Revised Code 1943. Also see McDowell v. McDowell, 37 N.D. 367, 164 N.W. 23, and Minot Plumbing and Heating Company v. Bach, 44 N.D. 71, 74-75, 177 N.W. 507, 508. It is therefore necessary to determine, without being concerned about the marriage relationship, what rights a joint tenant or tenant in common has in the income, rents and profits from property held in joint tenancy or tenancy in common.

The Supreme Court in Johnson v. Johnson, 38 N.D. 138, 164 N.W. 327, held that where property owned by tenants in common is rented to a third person and one of the tenants in common receives more than his share of the rents, he can be held to account for the excess over his share by the tenant in common receiving less than his share. The Court's holding was based upon its express adoption of the English Statute of Anne as part of our common law. Though the case involved a tenancy in common, the pertinent part of the Statute of Anne gave the same cause of action to joint tenants as well as tenants in common, and adoption of the Statute must be taken to include its adoption with respect to joint tenants also.

The Court in the above case pointed out that it was not necessary "to pass upon the proposition whether, if the land had not been rented to a third person, any recovery could be had." Apparently that proposition has not been decided in North Dakota, and, since there is no statute which applies, it is necessary to determine what the common law right of a joint or common tenant is in the profits and income from property not rented to a third person.

The rule as stated in 48 C.J.S. 932, Section 9, 62 C.J. 445-451, 14 American Jurisprudence 99-108, and 27 ALR 184-235, is that ordinarily a joint tenant is entitled to an equal share of the profits of the joint property and that a tenant in common is entitled to a share of the profits in proportion to his interest in the property. The recognized exceptions to this general rule include the right of each cotenant to occupy the common property and own the crops he raises

thereon or to take all the profits from his own capital, labor and skill resulting from his occupancy of the property without being liable to his cotenants unless he has excluded or ousted them or agreed to share with them. This is the rule which was impliedly approved by way of dictum in Johnson v. Johnson, above, and is the law that should be applied here.

The law then can be summarized as follows: A joint tenant or tenant in common has a legal right to recover his share of rents and profits from his cotenant when:

1. The property is rented to a third person; or
2. Such joint tenant or tenant in common has been ousted or excluded from possession by his cotenant; or
3. Such joint tenant or tenant in common, not in possession, has an agreement with the cotenant in possession to share in the rents and profits.

Since a joint tenant or tenant in common has the legal right to his share of rents and profits in the above circumstances, it is income to him and should be reported by him as part of his gross income in his North Dakota income tax return. In the case of a husband and wife, the share to which each is legally entitled may be reported by each on his or her separate return. But a joint tenant or tenant in common who has entered upon the jointly owned property without excluding his cotenants or interfering with their rights is under no obligation to them for any profits that he makes from his own capital, labor or skill in using and occupying the property unless he agreed to share with them, and in such a case all income must be reported by him.

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